In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1474

FERMONT DIVISION DYNAMICS CORPORATION OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims denying it an equitable price adjustment on its contract with the United States Air Force.

1. Petitioner contracted to furnish diesel generators to the Air Force. Specifications incorporated into the two contracts involved referred to the packaging of a battery liquid, called electrolyte. Engine specifications also expressly required the furnishing of electrolyte, while the specifications for batteries did not. However, the government under substantially similar specifications in prior procurements of diesel generators, of which petitioner was aware, had required the furnishing of electrolyte.

Petitioner was ordered by the contracting officer to furnish with each unit a separate-packaged quantity of electrolyte. Petitioner, contending that this was not re-

quired by the specifications, asked for an equitable adjustment in the contract price. The contracting officer denied the claim. Petitioner then appealed to the Armed Services Board of Contract Appeals, which affirmed the decision of the contracting officer (Pet. App. B 1-31). The Board held that (Pet. App. B p. 25):

> the specifications were patently ambiguous; that [petitioner] was in fact or, if not, should have been, aware of this ambiguity; that it should have inquired whether the Government wanted electrolyte to be furnished with the generators; and that the construction of the specifications, adopted by [petitioner] without inquiry, was an unreasonable one in the light of the entire record, including its participation in and knowledge of past MBTeen generator procurements.

Petitioner then instituted this action in the Court of Claims for review of the Board's decision under the standards of the Wunderlich Act, 41 U.S.C. 322. The Court of Claims affirmed the Board's decision and adopted the same as the basis for its own decision (Pet. App. A, 1-3). The Court of Claims held that in the circumstances of this case "[i]t was not reasonable for plaintiff to rely on its interpretation without inquiry" (*id.* at 2).

2. The decision of the Court of Claims, which rests on the peculiar facts of this case, is correct. Accordingly, further review is not warranted.

In its petition, petitioner challenges an evidentiary ruling of the Armed Services Board of Contract Appeals allowing the introduction of evidence relating to the

government's requirement of electrolyte in prior procurements, of which petitioner had knowledge. The Court of Claims has held that a party's knowledge of prior procurements is relevant to an interpretation of the contract at issue. See, *e.g.*, *Singer-General Precision, Inc.* v. *United States*, 427 F. 2d 1187, 1191 (Ct. Cl.) *D&L Construction Co.* v. *United States*, 402 F. 2d 990, 994 (Ct. Cl.). Moreover, as found by the Board in this case, "neither party has argued that the prior MBTeen generator procurement experience was irrelevant or immaterial to [petitioner's] understanding of the original * * * contract specifications and the record supports the conclusion their views in this regard are correct" (Pet. App. B, 20). Therefore, petitioner was precluded from challenging the relevancy of this evidence for the first time in the Court of Claims.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[1]Furthermore, in its petition (par. 4) filed in the Court of Claims petitioner stated that it "adopts fully and by reference the statement and findings set forth in the [Board's] decision * * *".

MAY 28 1974

MICHAEL RODAK, JR., CL

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REPLY MEMORANDUM OF PETITIONER

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REPLY MEMORANDUM OF PETITIONER

This memorandum replies to respondent's inaccurate statement of the crux of the Petition.

(1) Petitioner in the Court of Claims accepted only the validity of the statement of facts of the ASBCA and challenged the misuse of evidence and the law applied.

(2) At the ASBCA petitioner objected to the introduction of all evidence of prior procurements. The objection was overruled and the evidence received only for the limited purpose relevant to respondent's allegation that a trade practice theretofore existed with respect to electrolyte. Evidence of prior procurement was not accepted for the purpose of attributing actual notice of the details of those prior procurements to petitioner. Nonetheless, that evidence was applied by the ASBCA and the Court of Claims to establish actual notice and create a patent ambiguity.

(3) The denial of due process is the failure of the ASBCA and Court of Claims to adhere to the ruling which accepted the evidence for the limited purpose. In reliance upon that ruling petitioner introduced no evidence to contest attribution of actual notice, though such evidence existed. Petitioner was effectively foreclosed from rebutting and attacking the evidence of actual notice upon which the entire decision was predicated.

(4) Cases cited by respondent do not deal with the issue of the misuse of evidence introduced for a limited purpose and later applied to support different and broader holdings.

It is respectfully submitted that the Petition for A Writ of Certiorari should be granted.

ROBERT D. WITTE
Counsel for Petitioner